THE WILDERNESS SOCIETY
GREAT BEAR FOUNDATION

IBLA 99-379 Decided January 28, 2000

Appeal from a Decision of the State Director, Bureau of Land Management, Montana State Office, dismissing a protest of a patent application. MTM 80435.

Affirmed; motion to intervene granted; request for stay denied; and motions for hearing and for expedited consideration denied as moot.

1. Administrative Appeals: Generally--Administrative Procedure: Generally--Administrative Procedure: Administrative Record--Rules of Practice: Generally--Rules of Practice: Appeals: Stay

   Where the record demonstrates that the core issues of appellants' protest were decided against appellants in a U.S. District Court opinion which was affirmed by the Ninth Circuit Court of Appeals, and the remaining reason for appeal to this Board cannot prevail, it is appropriate to rule on the merits of the appeal and deny a request for a stay as moot.

2. Mill Sites: Generally

   Notwithstanding a Solicitor's Opinion concluding that the General Mining Law of 1872 authorizes the patenting of no more than one 5-acre dependent mill site per lode or placer mining claim, Congress has declared that, in accordance with provisions of the Bureau of Land Management's Handbook for Mineral Examiners and the Forest Service's Manual, neither the Department of the Interior nor the Department of Agriculture shall limit the number and acreage of mill sites.

APPEARANCES: Todd D. True, Esq., Earthjustice Legal Defense Fund, Seattle, Washington, for Appellants; James K. Aronstein, Esq., Ducker, Montgomery & Lewis, P.C., Denver, Colorado, for Noranda Minerals Corporation.

OPINION BY ADMINISTRATIVE JUDGE PRICE

The Wilderness Society (TWS) and Great Bear Foundation (GBF) have appealed the July 15, 1999, Decision of the Montana State Director, Bureau of Land Management (BLM), dismissing their protest against mineral patent application MTM 80435 of Noranda Minerals Corporation (Noranda) for two lode mining claims, the HR 133 and HR 134, which are part of Noranda's Montanore Project. The mining claims are located partially within the Cabinet Mountain Wilderness Area in T. 27 N., R. 31 W., Principal Meridian, Montana. In their Notice of Appeal, Appellants also requested a stay of the Decision, which Noranda opposed in its Objection to Appellants' Request for a Stay filed on September 10, 1999. On October 9, 1999, Noranda filed a Motion to Intervene and Answer, which is granted. In addition, on November 15, 1999, Appellants filed their Motion for Hearing. Lastly, on December 20, 1999, Noranda filed a pleading styled Notice of Enactment of Relevant Law, Motion for Expedited Consideration and Objection to Motion for Hearing.

On October 7, 1991, Appellants filed their protest (MTM 80345) 1/ against the patent application on the grounds that Noranda failed to make a discovery before the land was withdrawn from mineral entry on January 1, 1984; that the Wilderness Act of 1964, 16 U.S.C. §§ 1131 to 1136 (1994), bars extralateral rights in national forests; and that the claims were not properly located under Montana state law. These claims were litigated and decided against TWS and GBF by the district court in a thoroughly considered opinion 2/ which was affirmed by the Ninth Circuit in all particulars. The Wilderness Society v. Dombeck, 168 F.3d 367 (1999). In its Decision, BLM explicitly adopted the Ninth Circuit's reasoning with respect to such issues. (Decision at 1.)

By letter dated May 3, 1999, however, TWS and GBF for the first time raised the issue of whether the patent application should be denied and their protest granted because Noranda claimed more than 250 mill sites associated with the two mining claims, citing Solicitor's Opinion, M-36988, Limitations on Patenting Millsites Under the Mining Law of 1872 (November 7, 1997). (May 3, 1999, Letter at 2.) The Solicitor's Opinion determined that, under the General Mining Law of 1872, 30 U.S.C.

1/ Appellants originally filed their protest on Sept. 4, 1991. However, Noranda withdrew its patent application (MTM 80343) on Sept. 26, 1991, to correct a typographical error in the plat of survey for Mineral Survey 11012. As a result, BLM returned Appellants' protest without prejudice. An amended plat of survey was approved on Sept. 17, 1991, and on Sept. 26, 1991, the patent application as corrected was filed and serialized as MTM 80435. Appellants resubmitted their protest on Oct. 7, 1991.

2/ The Wilderness Society v. Jack Ward Thomas, CV 91-78-M-CCL (D.C.D. MT Aug. 12, 1997). A copy of the District Court's Opinion and Order was submitted as Ex. D to Noranda's Objection to Appellants' Request for Stay.

§ 42 (1994), "only one five-acre millsite claim per mining claim may be patented." (Solicitor's Opinion at 8.) Thus, Appellants argue that

> in the absence of the illegal use of excessive numbers of millsite claims, or an available legal alternative for mining facilities that would allow Noranda to develop claims HR 133 and 134, it does not appear that Noranda can develop its lode mining claims into a mine at all without significant additional costs for land acquisition or other measures if such are even possible.
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> In short, at this time and without violating other provisions of the 1872 Mining Law, specifically, the limitation on the use of millsite claims, Noranda cannot meet the basic "prudent person" rule for showing that its lode mining claims HR 133 and 134 actually can be developed and mined at a profit.

(May 3, 1999, Letter at 3 (citations omitted).) The State Director rejected this argument, citing Title III of the Emergency Supplemental Appropriations, 1999 (the 1999 Act), Pub. L. No. 106-31, 113 Stat. 90 (May 21, 1999).

As set forth in 43 C.F.R. § 4.21(b), a party must demonstrate that a stay is justified based on relative harm to the parties, the likelihood of success on the merits, the likelihood of immediate and irreparable harm to the moving party if the stay is not granted, and whether granting the stay is in the public interest. P&K Co., Ltd., 135 IBLA 166, 167 (1996); Jack Ivankovich, 133 IBLA 61, 62 (1995); Clay Worst, 128 IBLA 165, 166-67 (1994).

[1] We find that Appellants have failed to discharge their burden, particularly with respect to the likelihood of success on the merits. As noted, the core issues of Appellants' protest -- discovery prior to withdrawal, the nature and extent of extralateral rights, and the validity and location of the claims under state law -- were decided in Noranda's favor and the District Court's decision was affirmed by the Ninth Circuit Court of Appeals in all respects. Thus, Appellants' appeal depends entirely on its argument regarding the limitation on the number of mill sites established by the Solicitor's Opinion, supra. It is clear, however, that Appellants cannot prevail, because BLM is correct that the Congress had provided for a rule contrary to that articulated by the Solicitor's Opinion in the 1999 Act:

> SEC. 3006. MILLSITES OPINION. (a) PROHIBITION ON MILLSITE LIMITATIONS. -- Notwithstanding the opinion dated November 7, 1997, by the Solicitor of the Department of the Interior concerning millsites under the general mining law (referred to in this section as the "opinion"), in accordance with the millsite provisions of the Bureau of Land Management Handbook for Mineral Examiners H-3890-1, page III-8 (dated

> 1989), and section 2811.33 of the Forest Service Manual (dated 1990), the Department of the Interior and the Department of Agriculture shall not limit the number or acreage of millsites based on the ratio between the number or acreage of millsites and the number or acreage of associated lode or placer claims with respect to the Crown Jewel project, Okanogan County, Washington for any fiscal year.
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> (c) No patent application or plan of operations submitted prior to the date of the enactment of this Act shall be denied pursuant to the opinion of the Solicitor of the Department of the Interior dated November 7, 1997.

113 Stat. 90-91.

Despite this seemingly unambiguous directive, in their Notice of Appeal and Request for Stay (Notice of Appeal), Appellants argue that the Act

> does not alter the conclusion that Noranda's plan to develop HR 133 and HR 134 violates the 1872 Mining Law because this section does not amend or otherwise modify the requirements of the mining law itself. Instead, section 3006(c) addresses a Solicitor's Opinion, not the Mining Law. That Opinion, while offering some insight into interpretation of the Mining Law, is not the law itself. The BLM's denial of TWS' patent protest erroneously treats section 3006(c) as if it had amended the 1872 Mining Law, which it did not do.

(Notice of Appeal at 4.) We cannot agree.

[2] Appellants urge a distinction without a practical difference, because there is no doubt that the Solicitor's Opinion analyzed and construed the Mining Law of 1872 in reaching the conclusion that no more than one 5-acre mill site per mining claim was authorized thereunder. It is Congress, however, which, pursuant to the Property Clause of the Constitution, art. IV, § 3, cl. 2, has the power to dispose of the public lands and under such terms and conditions as it deems necessary or fit. Bureau of Land Management v. Ross Babcock, 32 IBLA 174, 186, 84 I.D. 475, 481 (1977). In this case, Congress has chosen to clarify the manner in which the Mining Law of 1872 is to be interpreted by unequivocally declaring that the number of mill sites to be patented, with respect to patent applications and plans of operation submitted before May 21, 1999, shall be governed by the BLM Handbook and the Forest Service Manual.

The BLM Handbook provision referenced in the 1999 Act states:

> Each mill site is limited to a maximum of 5 acres in size and must be located on nonmineral land. Mill sites may be located

> by legal subdivision or by metes and bounds. Any number of mill sites may be located but each must be used in connection with the mining or milling operation.

(Emphasis supplied.) In similar fashion, § 2811.33 of the Forest Service Manual states:

> 2811.33 - Millsite Claims. A millsite claim may not exceed 5 acres and must be described by metes-and-bounds or by legal subdivisions. When nonmineral land not contiguous to a vein or lode is used or occupied by the proprietor of the vein or lode for mining or milling purposes, the nonadjacent surface ground may be included in an application for patent for such vein or lode (30 U.S.C. 42(a)) [1994].
>
> Where nonmineral land is needed and used, or occupied by a proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, the nonmineral land may be included in an application for patent for the placer claim (30 U.S.C. 42(b)) [1994]. The number of millsites that may be legally located is based specifically on the need for mining or milling purposes, irrespective of the types or numbers of mining claims involved (30 U.S.C. 42) [1994].

(Emphasis supplied.)

In their Supplemental SOR (SSOR) filed on September 21, 1999, Appellants nevertheless assert that "legislative riders to appropriations bills, like section 3006(c), expire when the appropriations of which they are a part expires, in this case at the end of fiscal year 1999 or September 30, 1999." (SSOR at 2.) Appellants argue, moreover, that the Conference Committee Report for Pub. L. No. 106-31 "makes it clear that the provision is a temporary measure pending a further agency analysis." (SSOR at 2.) Thus, they would distinguish section 3000(c) on the ground that Congress did not "expressly" state that it was to survive the expiration of the current fiscal year. (SSOR at 2.) Again, we cannot agree.

The Conference Report which accompanied H.R. 1141 did not, in our view, demonstrate that Congress intended that the prohibition against applying the Solicitor's Opinion to pending patent applications and mining plans of operation was to expire with the fiscal appropriations enumerated in the bill. To the contrary, the Conference Report language, which we quote in full below, showed an intent to restore the status quo as it existed before the Solicitor's Opinion was issued, and to maintain it until such time as Congress directed otherwise:

> The managers have included a provisions [sic] restricting the implementation of the Department of the Interior Solicitor's opinion of November 7, 1997 concerning millsites under

> the general mining law with respect to the Crown Jewel project and to patent applications and plans of operation submitted prior to the date of enactment of this Act.
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> The managers are very concerned about the effect of the Solicitor's opinion dealing with the implementation of the Mining Law of 1872 in that it limits the number of millsites to one five-acre millsite per patent. Executive Departments typically implement laws through regulation. The regulatory process allows all affected parties to express their views through an open, public comment process. In the case of a solicitor's opinion, there is no public comment or appeal process before implementation.
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> This opinion is particularly troubling because both the Bureau of Land Management and the Forest Service have been approving patents with more than one five-acre millsite per patent based on procedures outlined in their operations manuals. To ascertain the impact of this opinion, the managers direct the Department of the Interior and the Forest Service to provide a report to the House and Senate Committees on Appropriations no later than August 31, 1999. The report should detail by State all past, present and pending mining operations, including all grandfathered mineral patent applications and plans of operations, that could be impacted by the Solicitor's opinion of November 7, 1997.

(Conference Report 106-143 at 90.) Given the concerns articulated by the conferees and the language employed, we would have found it exceedingly difficult to conclude that section 3006 expired simply because the fiscal year to which the various appropriations pertained had ended.

However, rather than prolonging the argument regarding the status of the prohibition, we deemed it prudent to await the enactment of a new appropriations act. On November 29, 1999, President Clinton signed the Consolidated Appropriations Act for Fiscal Year 2000 (the current Act), H.R. 3194, Pub. L. No. 106-113. Section 337(a) of the appropriations for the Department of Interior 3/ provides as follows:

> SEC. 337. (a) MILLSITES OPINION- No funds shall be expended by the Department of the Interior or the Department of Agriculture, for fiscal years 2000 and 2001, to limit the number or acreage of millsites based on the ratio between the number or acreage of millsites and the number or acreage of associated

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3/ H.R. 3194 referred to and incorporated H.R. 3423, which contains section 337(a).

> lode or placer claims with respect to any patent application grandfathered pursuant to section 113 of the Department of the Interior and Related Agencies, Appropriations Act, 1995; any operation for which a plan of operations has been previously approved; or any operation for which a plan of operations has been submitted to the Bureau of Land Management or Forest Service prior to November 7, 1997.
>
> (b) NO RATIFICATION- Nothing in this Act or the Emergency Supplemental Act of 1999 shall be construed as an explicit or tacit adoption, ratification, endorsement, approval, rejection or disapproval of the opinion dated November 7, 1997, by the solicitor of the Department of the Interior concerning millsites.

Section 112 of the Department of the Interior and Related Agencies Appropriations Act, 1995 (the 1994 Act), H.R. 4602, Pub. L. No. 103-332, 108 Stat. 2499, 2519 (Sept. 30, 1994), provided that if legislation was not enacted before the 103rd Congress adjourned, none of the funds appropriated could be obligated or expended to accept, process, or issue patent applications for any mining or mill site claim located under the general mining laws. Under section 113, however, section 112 did not apply to patent applications filed with the Department on or before September 30, 1994, that fully complied with applicable requirements as of that date. It is undisputed that Noranda's patent application is within the exception created by section 113 of the 1994 Act.

We conclude that the current Act effectively silences Appellants' arguments. BLM therefore did not err in implementing the will of Congress as expressed in section 3006(c) of the 1999 Act, and the current Act maintains the status quo as it was established by the 1999 Act. It follows that Appellants' argument cannot prevail and that the requested stay must be denied, and in reaching that conclusion, we perforce have decided the appeal on its merits. The motions for a hearing and for expedited consideration thus are denied as moot.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the motion to intervene is granted, the decision appealed from is affirmed, the request for a stay is denied, and the motions for a hearing and for expedited consideration are denied as moot.

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T. Britt Price
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge